Pacific Custom Materials, Inc. a wholly-owned subsidiary of Texas Industries, Inc. *and* Warehouse Union Local 6, International Longshoremen's and Warehousemen's Union, AFL–CIO. Cases 32–CA–15271 and 32–CA–15498

October 30, 1998

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

The complaint in this case[1] alleged that the Respondent is a successor employer obligated to bargain with the Union and that the Respondent committed several violations of Section 8(a)(1), (3), and (5). The judge found several unfair labor practices, including the unlawful refusal to hire certain former employees of the predecessor employer in order to avoid the successor bargaining obligation, but he dismissed several individual 8(a)(1) and (3) allegations and failed to make conclusions of law with respect to several alleged 8(a)(1) violations. The Board has considered the decision in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings[2] and conclusions, except as discussed below, and to adopt the recommended Order, as modified.[3]

We find merit in the General Counsel's exceptions to the judge's failure to find several additional violations of Section 8(a)(1). These additional violations are based on conversations between an official of the Respondent and employees of the predecessor who were interested in employment by the Respondent. In this regard, the judge specifically found, based on credited testimony, that the Respondent's plant manager, Lee Allen, told employee Estrellita Lewis that her new company was nonunion and she would have to be a salaried nonunion employee; told employees Steve Thomas and Donald Davis that laid-off employees would be rehired but that there would be no union, and that Allen wanted them to try being nonunion for a 90-day trial period; explained the hiring process to employee Gary Silveira as "a numbers thing" and told employees Wiles and Benevidez that he could only hire a certain percentage of the old employees because "Texas" [Respondent's parent corporation] was afraid they would "vote the Union back in and Texas did not want the Union." Particularly in light of the Respondent's unlawful scheme to avoid hiring a majority of its new work force from the predecessor's unionized workforce, and thereby to avoid having to recognize and bargain as a successor employer with the Union, each of the afore-mentioned statements interfered with and coerced employees in the exercise of their statutorily protected rights to engage in union activities and to have the Union as their exclusive collective-bargaining representative. We find that these statements violated Section 8(a)(1) of the Act, and we shall modify the recommended Order and notice by including references to these violations, as well as the similar violation the judge found but omitted from his recommended Order.[4]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Pacific Custom Materials, Inc., Port Costa, California, a wholly-owned subsidiary of Texas Industries Inc., its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraphs 1(e) and (f) and reletter the subsequent paragraph:

"(e) Telling employees that its Port Costa, California, facility would be nonunion, that only nonunion employees would be hired, or that employees should try working nonunion for a trial period.

"(f) Telling employees that only a limited number or percentage of the former employees would be rehired because the Respondent did not want a union."

2. Substitute the attached notice for that of the administrative law judge.

MEMBER HURTGEN, dissenting in part.

I do not agree that Respondent (a successor) was obligated to bargain about its initial terms and conditions of employment.

In *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), the Supreme Court clearly stated the general rule that a successor employer is not required to bargain about its initial terms and conditions of employment. The Court explained that Section 8(a)(5) forbids an employer from changing its terms and conditions of em-

[1] On January 3, 1997, Administrative Law Judge Jay R. Pollack issued the attached decision. The General Counsel and the Respondent each filed exceptions, supporting briefs, and answering briefs. The General Counsel also filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] We agree with the judge that the appropriate remedy for the Respondent's unlawful refusal to hire employees in order to avoid a successor's bargaining obligation should include provisions for restoration of the terms and conditions of employment under the predecessor's contract with the Union. See *Galloway School Lines*, 321 NLRB 1422, 1425–1427 (1996). We also agree with the judge's recommendation to require Respondent to offer a job and provide backpay to Ricardo Ortiz. The impact, if any, on this remedy of a job offer made and rejected in May 1996 can be litigated in compliance proceedings.

[4] We find no need to pass on the General Counsel's exceptions to the judge's failure to find that Steve Johnson was a supervisor within the meaning of Sec. 2(11) or that Human Resources Director Gordon Yonz made unlawful coercive statements. Any additional unfair labor practice findings based on the conduct of these two individuals would be merely cumulative and would not affect the remedy in this case.

ployment. Thus, where the successor's initial terms and conditions represent a change from those of its predecessor, there is no 8(a)(5) violation.[1] That is, the successor would be changing the predecessor's terms, but would not be changing its own terms.[2]

The general rule is also supported by sound policy considerations. As the Court noted, there is a public interest in allowing a new employer to start afresh. Just as we do not saddle the new employer with the contract of its predecessor, so we should not saddle the new employer with the predecessor's terms and conditions of employment.

The Court, however, did offer one possible exception to the general rule. The Court stated:

> Although a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor, there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms. [406 U.S. at 294–295.]

I note first that the statement is dictum. Secondly, the Court said that, in the circumstances described, it will be "appropriate" to "consult" with the union about initial terms. This is significantly short of a statement that the successor would be required to bargain. Arguably, the Court was simply signaling that an 8(a)(2) violation would not lie if the successor consulted with the union prior to hiring the predecessor's employees. in any event, the Court did not speak of a requirement to bargain.

Finally even if "appropriate to consult" means "required to bargain," there would be no such requirement here. As noted, the bargaining requirement (as to initial terms) attaches only if the successor employer "plans to retain all" of the predecessor employees. In the instant case, even if Respondent had hired the 10 discriminatees, there were at least 6 other predecessor employees whom it (legitimately) did not hire. Manifestly, there was no "plan to retain all" of the predecessor employees.

My colleagues contend that Respondent's 8(a)(3) violations preclude Respondent from asserting its right to set initial terms and conditions of employment. I disagree. The 8(a)(3) violations yield their own compensatory remedy of reinstatement and backpay. It is excessive and punitive to use those 8(a)(3) violations to take away the legitimate defense to an 8(a)(5) allegation concerning the setting of initial terms.

I recognize that the Board has rejected the position set forth herein, and that circuit courts have ruled that the Board's position is a permissible one.[3] However, the Supreme Court, whose plain language points the other way, has never ruled on the issue. In addition, even if the Board's position is a permissible one, it would seem that the position set forth herein is a more prudent one, more balanced concerning a successor employer's obligations, and is more consistent with the Supreme Court's language.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to hire or consider for employment prospective employees because they are members of or affiliated with Warehouse Union Local 6, International Longshoremen's and Warehousemen's Union, AFL–CIO, or to avoid an obligation to recognize and bargain with the Union.

WE WILL NOT tell employees at our Port Costa, California facility that it will be nonunion, that former employees will only be rehired as nonunion employees, or that former employees should try working nonunion for a trial period.

WE WILL NOT tell employees that only a limited number or percentage of the former employees will be hired because we do not want a union.

WE WILL NOT threaten employees with retaliation for engaging in union activities, testifying at a Board hearing, or for engaging in lawful picketing activity.

WE WILL NOT refuse to recognize and bargain in good faith with the Union as the exclusive collective-bargaining representative of our production and maintenance employees at our Port Costa, California facility.

WE WILL NOT unilaterally change wages hours and other conditions of employment without bargaining about these changes with the Union.

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[1] *Burns* at 294.

[2] By contrast, a subsequent change by the successor from the initial terms would be subject to the bargaining obligation.

[3] *New Breed Leasing Corp. v. NLRB*, 111 F.3d 1460 (9th Cir. 1997); *NLRB v. Staten Island Hotel*, 101 F.3d 858 (2d Cir. 1996); *Pace Industries v. NLRB,* 118 F.3d (8th Cir. 1997); *Canteen Corp. v. NLRB*, 103 F.3d 1355 (7th Cir. 1997); *U.S. Marine Corps v. NLRB*, 944 F.2d 1305 (7th Cir. 1991).

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer the following employees employment to the positions that they would have occupied if they had not been unlawfully denied employment, dismissing, if necessary, anyone who may have been hired or assigned to perform the work that they would have been performing or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and WE WILL make them whole for any loss of earnings and other benefits resulting from our failure to hire them, less any net interim earnings, plus interest:

Donald Davis	Ricardo Ortiz
Danny Dominguez	Julian Silva
Jesus Esparza	Danny Smith
Lucio Guiterrez	Steven Thomas
Estrellita Lewis	Horacio Villalobos

WE WILL, within 14 days from the date of the Board's Order, remove form our files any reference to the unlawful refusal to hire the above-named individuals and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that these personnel actions will not be used against them in any way.

WE WILL recognize and, on request, bargain collectively with the Union as the exclusive representative of our production and maintenance employees at our Port Costa, California facility, with regard to wages, hours and other terms and conditions of employment and, if agreement is reached, embody it in a signed agreement.

WE WILL, on request of the Union, rescind any departures from terms and conditions of employment that existed prior to our takeover of PLA's Port Costa Materials operation, retroactively restore preexisting terms and conditions of employment, and make whole the bargaining unit employees by remitting all wages and benefits that would have been paid absent such unilateral changes from on or about February 22, 1996, until we negotiate in good faith with the Union to agreement or to impasse.

PACIFIC CUSTOM MATERIALS, INC. A WHOLLY-OWNED SUBSIDIARY OF TEXAS INDUSTRIES, INC.

Sharon Chabon, Esq., for the General Counsel.
John D. McLachlan, Esq. and *Lynn D. Lieber, Esq. (Fisher & Phillips),* of Redwood City, California, for the Respondent.
Robert Remar, Esq. (Leonard, Nathan, Zuckerman, Ross, Chin, & Remar), of San Francisco, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at Oakland, California, on 12 dates beginning June 10, and ending August 12, 1996. On February 28, 1996, Warehouse Union Local 6, International Longshoremen's Union, AFL–CIO (the Union) filed the charge in Case 32–CA–15271 alleging that Pacific Customs Materials, Inc., a wholly-owned subsidiary of Texas Industries, Inc. (Respondent) committed certain violations of Section 8(a)(5), (3), and (1) of the National Labor Relations Act (the Act). On April 30, 1996, the Regional Director for Region 32 of the National Labor Relations Board issued a complaint and notice of hearing against Respondent, alleging that Respondent violated Section 8(a)(5), (3), and (1) of the Act. During the hearing, on June 11 the Union filed the charge in Case 32–CA–15498. On July 19, 1996, the Regional Director issued a complaint in that case. On July 23, I granted General Counsel's motion to consolidate the cases. Respondent filed timely answers to the complaints, denying all wrongdoing.

The parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. On the entire record, from my observation of the demeanor of the witnesses,[1] and having considered the posthearing briefs of the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a California corporation with a principal place of business in Port Costa, California, where it has been engaged in the production and sale of lightweight aggregate products. During the first 6 months of 1996, Respondent sold and shipped goods and materials valued in excess of $50,000 directly to customers located outside the State of California. Accordingly, Respondent admits and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background and Issues

Prior to January 23, 1996, Port Costa Materials (Port Costa) was engaged in the production and sale of lightweight aggregate products at a facility located in Port Costa, California. Port Costa was a wholly-owned subsidiary of PLA Holdings. PLA also owned a lightweight aggregate manufacturing facility in Frazier Park, California, and a quarry in Olancha, California. On January 23, Respondent purchased the Port Costa, Olancha, and Frazier Park facilities from PLA Holdings. The Port Costa facility is the only facility at issue in this case. The Union represented production and maintenance employees at the Port Costa facility. The other two facilities were nonunion.

Prior to the purchase of the Port Costa plant by Respondent, the Union had represented the maintenance and production employees since at least 1950. The most recent collective-

[1] The credibility resolutions have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.,* 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings herein, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence or because it was in and of itself incredible and unworthy of belief.

bargaining agreement between Port Costa and the Union was effective by its terms from June 1, 1994, through May 31, 1998.

Texas Industries (TXI) made an offer to purchase the Port Costa, Olancha, and Frazier Park facilities in May 1995. Employees learned of the possible sale in the fall of 1995. In December 1995, in anticipation of the sale, Port Costa shut down its manufacturing operations. On or about January 22, 1996, the Port Costa employees were discharged. There were 32 maintenance and production workers in the bargaining unit represented by the Union at the time the plant was purchased by Respondent. Two of these employees were mechanics who were excluded from the bargaining unit by agreement between Port Costa and the Union. The other eight mechanics were in the bargaining unit. While all 32 employees applied for employment with Respondent, Respondent hired only 15 of the former Port Costa employees. Of these 15 employees, 2 were the nonunion mechanics who were excluded from the bargaining unit.

In this case, the General Counsel alleges that Respondent failed and refused to hire 16 employees in order to avoid a successorship obligation under the Act.[2] The complaint further alleges that Respondent refused to recognize and bargain with the Union and made unilateral changes in terms and conditions of employment without notice to and bargaining with the Union. Further, the complaint alleges that Respondent committed independent violations of Section 8(a)(1) of the Act by certain statements to employees. Finally, the second complaint alleged that Respondent selected two employees for drug and alcohol testing in retaliation for those employees giving testimony in this case. Respondent denies the commission of any unfair labor practices. Further, Respondent contends that its hiring practices were not affected by union considerations but rather that it selected employees based on qualifications. Respondent alleges that it would not have hired a majority of Port Costa's employees in any event, and, therefore would not be a successor employer. Further, Respondent argues that its operation is substantially changed from that of Port Costa and that it is not a successor employer. Respondent contends that the drug and alcohol tests at issue herein were part of a TXI companywide program of random testing and free from any discriminatory motive. Finally, Respondent denies the unlawful statements attributed to it.

B. The Facts

1. The failure to hire

The Union represented the production and maintenance employees at the Port Costa facility for at least 45 years prior to Respondent's purchase of the plant. The collective-bargaining agreements between PLA and the Union were multiunion, multiemployer collective agreements. The most recent collective-bargaining agreement between the Union and Port Costa was not set to expire until May 31, 1998. On January 23, 1996, Respondent purchased the assets of the Port Costa facility and the nonunion Frazier Park and Olancha facilities from PLA.

The purchase of the PLA facilities took over a year to complete. In May 1995, Respondent made an offer to purchase the assets of the PLA facilities at Port Costa, Olancha, and Frazier Park. In October, Lee Allen, now Respondent's plant manager and then Port Costa's plant superintendent, held a meeting for employees at which he told employees that the plant had been sold to TXI and that TXI was "nonunion'' and did not believe in unions. Allen told the employees that they would have to apply to work for TXI to remain working at the facility. Allen assured the employees that the application process was only a formality and that he expected everyone to come back to work after TXI tookover. Allen denied making such comments but I credit the testimony of the employees over Allen's denials. However, at the time these statements were made, Allen had not applied for work with Respondent, had not interviewed for employment, and had not yet been hired by Respondent. Thus, Allen was not an agent of Respondent and, therefore, Respondent cannot be held responsible for these statements. As Allen was not an agent of Respondent, these statements are hearsay.

On November 19, Respondent began running advertisements in the San Francisco Chronicle soliciting applications for production, maintenace and office positions. These advertisements ran for 2 weeks, and set forth a December 1, 1995 deadline for the receipt of applications. The Port Costa employees were also encouraged to file job applications. Every Port Costa employee filled out an application and Allen forwarded the applications to Jim Milam of TXI, now Respondent's regional operations manager.

In November, Mel Brekhus, a TXI vice president, held a meeting with Allen and the Port Costa managerial and administrative staff. Gina Benevidez, operational accountant testified that at this meeting, Brekhus stated that Respondent was looking for the best qualified employees. An employee questioned Brekhus about the Union representing employees at Port Costa and about rumors that Respondent intended to get rid of the Union. Brekhus responded that Respondent facility at Port Costa would be nonunion and that Respondent intended to break up the Union. Lezlee Wiles, an administrative accountant, substantially corroborated Benevidez' testimony. Shortly after this meeting Wiles, Benevides, and Allen were offered jobs. Allen accepted the job as plant manager in early December.

I credit the testimony of Wiles and Benevidez over Respondent's denials. Wiles was a reluctant witness who was clearly fearful of losing her job. Further, she was a disinterested witness who stood to gain nothing from her testimony. Notwithstanding her reluctance to testify, Wiles gave testimony clearly against her employer's case. Under these circumstances, I find it highly unlikely that Wiles would give false testimony against her employer. I found Wiles to be a credible witness and credit her testimony over Respondent's denials. For the same reasons I found Benevidez to be a very credible witness. Moreover, within a day after Benevidez informed Respondent that she had been subpoenaed to testify in this case, Benevidez was ordered to undergo a drug test. In spite of all this, Benevidez gave testimony against her employer's interests. Under these circumstances, I find her testimony to be extremely credible.

Former employee Estrellia Lewis testified that in early December 1995, she went to the plant to discuss a vacation check. According to Lewis, Allen told her that the new company was nonunion and that she would have to be a salaried nonunion person. I find that by early December, Allen had been offered

[2] In *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), the Supreme Court held that the mere change of ownership in the employing industry did not relieve the new employer of an obligation to bargain with the exclusive bargaining representative of its predecessor's employees. The criteria upon which the Court upheld the bargaining obligation were that the bargaining unit remained unchanged and a majority of the employees hired by the new employer were represented by a recently certified bargaining agent.

and had accepted the position of plant manager for Respondent, contingent on the sale going through. Thus, I find that Allen's statements are admissions by a party opponent under the Federal Rules of Evidence, Rule 801(d)(2)(D) and, therefore, not hearsay.

In mid-December, in anticipation of the impending sale, Port Costa shut down its kiln operations, which resulted in the layoff of most of the production employees. Employee Daniel Dominguez testified that Allen assured him that he was going to keep his job. Employee Danny Smith who had previously been laid off testified that he called Allen to find out if he should empty his locker. According to Smith, Allen stated that it would not be necessary to clean out the locker because Smith would be coming back to work.

Employees Steve Thomas and Donald Davis testified that Allen told them that the laid-off employees would be rehired but that there would be no union. Allen told the employees that he wanted them to try being nonunion for 90 days as a trial period. Allen told Thomas that of the 200 outside job applications he had received, only 7 were worth forwarding to TXI.

Ross Gephart, president of Port Costa testified that in December and again in January 1996, Allen told him that he intended to hire back 90 percent of the bargaining unit employees.

In January, Jim Milam, TXI's regional operations manager, asked Allen to screen the outside applicants who had applied to Respondent's November newspaper advertisements. Of the 70 to 80 applications received by the company, Allen found only 7 or 8 adequate enough to forward to Milam. Allen told employees and testified at the trial that most of the applicants were only qualified to "flip burgers.'' The seven or eight employees whose applications were forwarded to Milam were not interviewed at that time.

On January 22, PLA transferred the assets of Port Costa and the other PLA companies to Respondent. On January 22, the Port Costa employees were paid their final paychecks. On that day, Estrellita Lewis asked Allen whether she should clean out her locker and Allen answered that she shouldn't worry because she was "coming back.'' Allen made similar statements to mechanics Steve Thomas and Donald Davis, that same day.

On January 23, Respondent began operations at the Port Costa facility. In addition to hiring Allen, Respondent hired nonunion-staff employees Benevidez, Wiles, Steven Johnson, shipping and quality control supervisor, Caine Lai, quality control, Stanford Koch, security, and Susan King clerical. Only one administrative employee whose position had been abolished was not hired. In addition, the two mechanics who were excluded from the unit and were not union members, Kevin Rudy and Robert Jasso, were hired. Operations began at the Olancha and Frazier Park facilities on January 23. All the employees hired at that time were former PLA employees.

In late January and continuing into late February 1996, Respondent conducted interviews with the former Port Costa employees. The employees were interviewed by Gordon Yonz, TXI's human resources director, and Lee Allen together. During the interviews Yonz told employees that TXI's other plants were nonunion. Yonz told the employees that it was up to the employees whether they wanted a union or not. Certain employees testified that Yonz stated that Respondent intended to remain nonunion or that the facility would remain nonunion.

On February 7, Respondent ran newspaper advertisements in the Contra Costa Times. Those advertisements drew a greater response from the local geographic area than had the advertisements in the San Francisco newspaper. At the same time, Yonz contacted the Private Industry Council which was working to place employees adversely affected by the base closure at Mare Island Naval Shipyard. Respondent also contacted the California Employment Development Department. Respondent received over 300 applications in response to these efforts. More important, due to layoffs at Mare Island and at S&H Sugar, a nearby sugar refinery, Respondent received applications from very qualified and even over qualified applicants for the production and maintenance jobs. These applicants were screened by Gordon Yonz and Ruth Laudan, another TXI human resources offical. Allen then interviewed the applicants passed on to him by Yonz and Laudan. Allen testified that he made the final decisions concerning which applicants to hire.

Allen testified that during the hiring process he made various written lists of the former employees and new hires he had decided to hire. The lists were a work in progress and Allen made various lists and changes to those lists. Respondent produced some lists and General Counsel obtained copies of other lists. Not all the lists drawn up by Allen were preserved by Allen or Respondent. The first list Allen made was a list of the Port Costa employees listed in "order of importance to operation.'' On another list, Allen listed only 18 employees. All those employees were former employees represented by the Union. Of those 18 employees, 13 were hired. Of the other five employees: Jesus Martinez did not pass his physical; Dave Schelhorn did not accept his offer; Ricardo Ortiz was not offered employment until May when he declined the offer; and Horacio Villalobos and Dave Dominguez were not offered employment until July.

On a list entitled "start-up 20 employees,'' Allen remarked at the bottom of the list "11 former union'' and "9 new or nonunion.'' The nine included Robert Jasso and Kevin Rudy, the two mechanics who were excluded from the bargaining unit by agreement between the Union and Port Costa. This startup list included Villalobos, Dominguez, Schelhorn, and Martinez. It further included Ricardo Ortiz as an alternative kiln burn operator.

On another list of "31 union employees,'' Allen listed 13 employees he would let go and 18 employees he would keep. He remarked that he was letting go 42 percent and keeping 58 percent. He further noted that the employees being retained had 65 percent of the total years of experience in the plant.

On the list entitled "dream team,'' Allen noted "former 61%.'' In this calculation, Allen included Jasso and Rudy, the nonunion mechanics, as former employees. The dream team list included 30 positions with 2 open or unfilled. Schelhorn, Dominguez, Martinez, Ortiz, and Villalobos were included on this list. Five of the new hires named on this dream team list did not go to work for Respondent. Allen placed an asterisk next to the names of the new hires and the two nonunion mechanics on this list.

Gary Silveira, an electrician, was listed as the most important employee on Allen's "order of importance'' list. Silveira was rehired prior to the reopening of the plant and reported to work on February 12. Silveira testified that on that date he and fellow employee Rafael Aguilar saw one of Allen's lists entitled "Dream Team.'' This list contained the names of 18 former Port Costa employees and new hires. According to Silveira this list included the name of Estrellita Lewis. The "Dream Team'' list in evidence did not include Lewis' name. However, it well

may be that there were several lists with that title. Aguilar also testified that he saw a "Dream Team'' list in Allen's office. Aguilar described the list as containing the names of 18 or 19 former union employees, the 2 nonunion mechanics and approximately 8 new employees. Aguilar also testified that he saw Estrellita Lewis' name on this list.

Silveira further testified that a few days after seeing the dream team list, he told Allen that Steve Johnson, quality control supervisor, had told him that there were going to be a "lot of new faces.'' Silveira said that he was confused because he had seen Allen's dream team list. Allen said that the list included the names of people Allen wished to bring back to work and who he thought would be best at bringing the plant back up and running. However, Allen said that "they'' had very strict rules on how he could hire and rehire for the plant positions and that he could only rehire so many of the people on the list. When Silveira asked why, Allen told him that it was a "numbers thing.''

Robert Stewart, former vice president of operations at Port Costa, testified that he called Allen in early February to find out how the transition was going. According to Stewart, Allen said that he had been told he could hire 49 percent of the former Port Costa union hourly employees, the limit had been changed to 46 percent. Stewart asked why the limits had been placed and Allen answered so that the employees would not have any "voting rights'' in the plant.

Wiles testified that in early February she asked Allen which former employees would be coming back. Allen answered that a certain percentage would have to be hired back before the Union could be reinstated. Benevidez, present for this conversation, testified that Allen stated that he could hire only a certain percentage of the old employees because "Texas'' was afraid they would "vote'' the Union back in and Texas did not want the Union. Allen denied the statements attributed to him by Silveira, Stewart, Wiles, and Benevidez. I found those witnesses to be more credible than Allen and I give no weight to his denials. Further, the lists drawn up by Allen tend to corroborate the testimony of these witnesses and to impeach Allen's testimony. The lists clearly show that Allen was particularly concerned with the number of union employees he kept and the percentage of former employees that made up the work force.

In mid-February, Allen began notifying former employees that they had not been hired by Respondent. Allen generally told the employees that he had decided to hire more experienced or more qualified employees. On February 22, Respondent commenced operations with a substantial and representative complement of 25 production and maintenance employees. Of these 25 employees, 11 were new hires, 2 were nonunion former employees, and 12 were former union represented employees. By February 23, Respondent had 29 employees. The four additional employees were new hires. By March 5, Respondent hired an additional three employees one of whom was a former union-represented employee.

On February 28, the Union made a demand for recognition and bargaining. Respondent had already set the intial terms and conditions of employment without notice to or bargaining with the Union. On March 4, Respondent refused to recognize and bargain with the Union. Respondent took the position that it would be "inappropriate to recognize the Union without a showing that the Union represented a majority of the employees.''

In March, Ross Gephart had a conversation with Jose Fulginiti, Respondent's sales manager. Fulginiti had been a vice president in charge of sales for Port Costa. During this conversation, Gephart mentioned that Respondent had not hired Steve Thomas, a mechanic, and Gephart asked why Thomas had not been hired. Fulginiti replied that Thomas had not been hired because he was a union shop steward. Gephart answered that he thought Thomas was one of the best employees at the plant. Fulginiti told Gephart that qualifications did not matter because "Jim Milam had given Lee Allen orders to hire back less than 50% of the work force.'' Fulginiti was not called to testify.[3]

2. The drug testing of witnesses Silveira and Benevidez

In June, prior to the opening of the hearing in this case, Gary Silveira gave Lee Allen a copy of the subpoena served on him by the General Counsel. Within an hour, Allen called Silveira into his office and asked whether Silveira believed in "coincidences.'' Allen told Silveira that the employee had been "randomly'' chosen to undergo a drug and alcohol test. Silveira took an alcohol test immediately and then went to a clinic for a drug screen.

Operational accountant Gina Benevidez was sent for a drug test shortly after calling Jim Milam and notifying Milam that she had been subpoenaed. The day after Benevidez informed Milam that she had been subpoenaed by the General Counsel, Benevidez was told that she had been randomly chosen for a drug and alcohol test. Benevidez was required to take an alcohol test immediately and then went to a clinic for a drug test.

The evidence shows that TXI has a companywide practice of randomly testing employees for drugs and alcohol. The employees are randomly selected by an outside company, Assurance Medical Corporation. TXI randomly tests 12.5 percent of its work force every calendar quarter. The 2 employees at issue here, Benevidez and Silveira, had been among 10 employees supervised by Milam, that were chosen for drug tests at the end of April 1996.[4] Milam had received the list of names at least 2 weeks prior to learning that the employees had been subpoenaed. Under company policy these employees would have been tested earlier, within 2 days of Milam's receipt of the list. However, due to Milam's travel schedule he requested a delay from TXI's human resources department. Thus, the evidence shows that these employees were randomly chosen prior to Respondent's knowledge of the subpoenas. The timing of the testing was based on Milam's travel schedule and not events connected to this case. Finally, the employees were not treated differently from other employees not participating in this case.

The only aspect of the drug testing that appears coercive is Allen's question to Silveira, "do you believe in coincidences?'' Such a question, under the circumstances of a drug policy, new to this plant and this employee, would tend to suggest to Silveira that the drug and alcohol tests were in retaliation for his impending testimony against Respondent. I find by this

[3] Although a time was set aside for Fulginiti to testify he did not testify. Respondent's counsel stated that Fulginiti was unavailable to testify but did not explain the circumstances which made Fulginiti unavailable. In any event, I credit Gephart's testimony.

I find Fulginiti's statements to be an admission by a party-opponent under Fed.R.Evid. 801(d)(2)(D) and, therefore, not hearsay. See *Nephi Rubber Products*, 303 NLRB 151, 158 (1991).

[4] This would have been the first time that the drug testing program applied to the employees at Port Costa, Olancha, and Frazier Park. All the employees had been required to pass a drug test as a condition of employment.

conduct, Allen implied that Respondent retaliated against employees for giving testimony under the Act.

3. Respondent's defenses

Respondent alleges that hiring for the Port Costa facility was not based on union considerations but rather on the "talents, skills and experience of those hired compared to those not hired.'' It contends that the employees it hired had greater skills, experience, and abilities than the employees who were not hired. Respondent further argues that even if Respondent hired all the employees on Allen's "dream team,'' Respondent would still not have hired a majority of PLA's Port Costa employees.

In the 5 years prior to Respondent's purchase of the Port Costa facility, the operation had lost almost $5 million. TXI, Respondent's corporate parent, operates businesses around the country which specialize in the production of cement and cement-related products. The purchase of the Port Costa facility took more than 1 year to complete. The sale was completed on January 23, 1996. Maintenance activities began at the Port Costa facility immediately following the purchase. However, the plant did not commence production until February 22, 1996.

Respondent ran advertisements for employees in the San Francisco Chronicle on November 19 and 26, 1995. Respondent received 80 applications for production and maintenance jobs. Of these 80 applications, 32 were from Port Costa employees. Of the other 48 applications, only 7 or 8 were deemed adequate enough for further review.

As stated earlier, the sale was delayed and Respondent did not begin interviewing until January. Milam interviewed some of the new applicants in January. According to Respondent it had not received enough applications. Allegedly at Allen's recommendation, advertisements were run in the Contra Costa Times, a local newspaper, on February 9 through 11. The company received over 200 applications in response to these advertisements. In addition, Respondent sought applicants from the State Employment Development Department and the Private Industry Coiuncil. New applicants were screened by Yonz and Ruth Laudan, from TXI's human resources department. Allen interviewed the former employees and the new applicants passed on to him by Yonz and Laudan. By March 1, Respondent had hired 32 employees. Fifteen of these employees (two of whom were nonunion employees) were former Port Costa employees. Seventeen of these employees were new applicants.

I next turn my attention to Respondent's specific reasons for the failure to hire the 16 employees at issue. Employee Danny Dominguez had worked at the plant for approximately 14 years. During his last year at Port Costa, Dominguez worked as a quarry operator. Dominguez was listed as number 19 on Allen's list of employees according to importance to the operation. In addition, Dominguez' name appears on Allen's startup and dream team lists as well as three other lists. In December, Dominguez was told by Allen that he would keep his job. Respondent contends that Dominguez was not hired because he had only 1 year's experience on the front loader used at the quarry. Dominguez did not have experience with two other pieces of equipment used by the two quarry operators Respondent now employs. Respondent contends that the two quarry operators hired were more qualified than Dominguez. It appears that the two other quarry operators had not been interviewed at the time Allen composed the dream team. Allen did not explain why Dominguez' name appeared on five staffing lists or why Dominguez was not offered employment after employee Dave Schelhorn did not accept his offer. While most of the applicants were interviewed by Yonz and Allen, Dominguez was interviewed by Jim Milam. Milam told Dominguez that Respondent did not have unions, did not believe in unions, and did not like unions.

Employee Dave Schelhorn worked at the plant for 16 years. Schelhorn was a quarry operator at the time Port Costa closed the facility. Shortly after his interview with Allen and Yonz, Schelhorn was offered a job as a quarry operator by Allen. Allen called Schelhorn at home and offered Schelhorn a job as a quarry operator. Allen explained the new employer's wage and benefit package. Schelhorn asked Allen whether he would have a helper in the quarry. Allen stated that he was simply offering Schelhorn a position. When Schelhorn did not respond, Allen asked if the employee wanted more time to think about the job offer. Allen asked Schelhorn to call him back. Allen did not receive a call from Schelhorn. Allen called Schelhorn's home on 2 days and left messages for Schelhorn to call him. Schelhorn did not call Allen until weeks later. By that time, Allen had filled the position. According to Allen, Schelhorn turned down the job. Schelhorn testified that there was confusion as to whether he was to call Allen or whether Allen was to call him. I credit Allen's testimony regarding these events. On cross-examination, Schelhorn admitted that he believed that Allen wanted to hire him as a quarry operator. I find that Allen offered Schelhorn employment and that the failure to hire Schelhorn was due to the employee's failure to accept Allen's job offer. Thus, I find there is no factual basis for the complaint allegation that Respondent refused to hire Schelhorn.

Employee Jesus Esparza worked as a laborer in the quarry department. Respondent concedes that Esparza was a great laborer. However, it contends that his position was eliminated and replaced by the position of general plant helper. It contends that the general plant helpers it did hire had more experience driving rolling stock and were cross-trainable. Robert Jasso testified that he had previously tried to cross-train Esparza and found him untrainable. The plant helpers hired by Respondent had more skills in operating and repairing equipment than Esparza. Esparza was listed as number 23 on the list of employees by importance to the operation.

Employee Jose Escobedo had been a laborer in the quarry. On two occassions in the past, Allen had discharged Escobedo. On each occassion, Escobedo was reinstated pursuant to settlement of a grievance. On Allen's list ranking employees by importance to the plant, Escobedo was listed last as number 32. Robert Stewart had written letters of recommendation in an attempt to aid the employees in finding employment. Stewart, who had approved Escobedo's prior terminations, wrote a letter for Escobedo but could not bring himself to recommend the employee for hire. Allen did not even grant Escobedo a job interview.

Employee Roberto Esparza worked as a prep plant operator. That position is now called the kiln feed operator. Respondent intends to automate this position and eliminate the need for employees in this classification. Respondent contends that its hiring for the kiln feed operator position was based on hiring employees with technical skills who could function elsewhere in the plant when the kiln feed operation became automated. Esparza was listed as number 25 on the list of employees by importance to the operation. He was also listed among the employees to be let go on the list of keep 58 percent and let go 42

percent. Respondent contends that Roberto Esparza was not hired because he was intoxicated at his job interview.

It is undisputed that when Esparza arrived at his interview with Yonz and Allen his eyes were bloodshot. Allen testified that Esparza looked like he was under the influence of an intoxicating substance and that Esparza was bobbing and weaving during the interview. Yonz testified that Esparza was slouched in his chair, his head bobbed, his eyes were bloodshot, and his face was red. Yonz believed that Esparza was intoxicated.

Gina Benevidez testified that Esparza was not intoxicated but confirmed that Esparza's eyes were red and that Esparza appeared to be very nervous. Lezlee Wiles also testified that Esparza was not intoxicated but that his eyes were red and he appeared to be nervous. Both Wiles and Benevidez heard Yonz and Allen discussing Esparza's appearance and their suspicion that he was intoxicated. Esparza denied that he had been intoxicated. However, he did admit that his face and eyes were red.

Although, there is no evidence that Esparza was actually intoxicated and I believe he was not intoxicated, the evidence does support a finding that Yonz and Allen had a legitimate belief that Roberto Esparza was intoxicated at the time of his interview.

Respondent claims it did not hire prep plant operator Lucio Guiterrez because Guiterrez had fewer skills and abilities than those employees it did hire. Allen further testified that Guiterrez was unable to be cross-trained, had little education, and did not read or speak English. Guiterrez had rejected offers from Port Costa to send him to school. The kiln feed operators hired by Respondent did have more skills in operating and maintaining equipment than Guiterrez. Guiterrez was listed as number 26 on the list of employees by importance and was among the 42 percent of employees to be let go on the keep 58-percent list. Guiterrez had worked 11 years for Port Costa.

Employee Estrellita Lewis was on a dream team list observed by Silveira and Aguilar. Her name did not appear on the dream team list in evidence. However, all of Allen's lists were not preserved. I credit Silveira's and Aguilar's testimony that he saw Lewis' name on such a list. Lewis was listed as number 20 on the list of employees by importance. Further, on January 22, Allen had assured Lewis that she would be coming back to work. Lewis had worked 9 years for Port Costa. However, Respondent did not hire Lewis as a kiln feed operator allegedly because she did not possess the skills to operate and maintain equipment that the new hires possessed. Allen testified that he had once tried to cross-train Lewis on the pellet extruder and that after a short period of time Lewis told Allen that the job was not for her.

Employee Ricardo Ortiz was working as a relief kiln burner. Originally Ortiz was not hired because Respondent hired kiln burners with more experience than Ortiz. There were four regular kiln burner operators and Respondent hired all four in February. There was no explanation as to why Ortiz was not offered another position. In May, Allen offered Ortiz a job as a kiln burner operator. Ortiz had obtained another job and declined the job offer. Ortiz had been listed as number 18 on the list of employees by importance. Further, he was an alternate on the list of 20 startup employees. Ortiz was included on a list of 18 employees as " kiln equip''[5] and on the list of the 58 percent of the union employees to keep. Respondnet offered no explanation as to why Ortiz was not offered a position as a kiln feed operator or plant helper.

Julian Silva had approximately 33 years of senority at the plant. Silva was listed as number 24 on the list of employees by importance. Allen testified that Silva was not hired because of a lack of ambition and enthusiasm, poor attendance, patent dislike for shift work, lack of transportation, and because of his lack of experience and general skills. Silva had been a laborer for a long time. He was a prep plant operator at the time of the plant closure. Allen testified that he tried to move Silva to higher positions at the plant but that Silva was not interested. Silva did not have the same skills in operating and maintaining equipment as the new hires.

Employee Ron Zachary had been listed number 27 on the list of employees by importance and had been listed with the 48 percent of the union employees to be let go. Zachary was not hired as a pellet extruder operator because of disciplinary problems while employed at Port Costa. Zachary made death threats to Allen, Supervisor Jasso, a shop steward, and other employees. Zachary had been discharged in 1992 because of threats to Jasso. Zachary was reinstated by an arbitrator's decision. Allen credibly testified, "It is difficult to hire someone who has threatened to throw you into a machine.'' Former Manager Robert Stewart had been involved in Zachary's prior terminations. When Stewart wrote letters, in March 1996, seeking to help the former PLA employees obtain employment, he did not recommend Zachary for employment. I find that because of the prior threats to Allen and Jasso, Zachary would not have been hired in any event.

Employee Danny Smith was a load out operator. This position, now known as aggregate crusher operator, is responsible for storing and loading fired product and for completing shipping documentation. Smith, who had worked for Port Costa for about a year, had already been on layoff status before the plant closure and sale. Smith testified that when he asked Allen whether he should clear out his locker, Allen explained that it would not be necessary because Smith would be coming back to work. Allen listed Smith as number 31 on the list of 32 employees by importance. Allen testified that Smith was not hired because of his poor work performance and poor attendance record. Allen also mentioned that Smith had not graduated from high school, had no welding certificate, and no trade school or apprenticeship experience. During Smith's interview with Yonz and Allen, Yonz said, "Wow, you have no experience compared to the rest of the people here.'' Robert Jasso corroborated Allen's testimony that Smith had problems safely operating the front loader. Respondent seems to have treated Smith's lack of seniority as reason not to hire him even though it chose not to treat seniority as a positive factor for other employees.

Employee Chris Preble was a load out operator who had been terminated twice by Port Costa. Preble was reinstated pursuant to an agreement between Port Costa and the Union. Preble was listed as number 29 on the list of employees by importance and was included in the list of union employees to be let go. Allen testified that Preble had a bad temper and got into arguments with fellow employees. This testimony was

[5] I find that "kiln equip" is shorthand for kiln feed operator. Employing Ortiz as a kiln feed operator would have allowed Respondent to also use Ortiz as a relief kiln burner operator.

corroborated by two other witnesses, Robert Jasso and Martin Del Torro Sr. In addition, Allen testified that he had received customer complaints about Preble. Robert Stewart did recommend Preble for hire. Based on the fact that Allen had terminated Preble on two occassions and the credible evidence of Preble's troubles with fellow employees, I find that Preble would not have been hired in any event.

Don Davis had worked for Port Costa for 4 years as a mechanic. Respondent hired 6 of the 10 mechanics formerly employed by Port Costa. Davis had been terminated with employee Mike Elderkin for a safety violation in 1993. These employees were reinstated pursuant to an agreement with the Union. Allen told Davis that the laid-off employees would be hired by Respondent but that the plant would be nonunion. Allen testified that Davis had a poor attitude, was not a team player, was disliked by his fellow employees and that he looked for ways to undermine the company. Further, Respondent contends that Davis' skills do not compare with the mechanics hired in his stead. As mentioned above, Respondent received applications from very qualified mechanics who had formerly worked at the Mare Island Naval Station. The four mechanics it hired instead of Davis and the other union mechanics were very skilled and experienced employees. Davis had been listed as number 28 on the list of employees by importance and was listed with the employees to be let go on the let go 42-percent list.

Michael Elderkin, a mechanic with 9 year's seniority, had been discharged, and later reinstated, with Davis for a safety violation. Elderkin was listed as number 30 on the list of employees by importance and was among the employees to be let go on the keep 58-percent list. Allen also testified that Elderkin was not hired because he had received warnings for poor performance, had received a suspension for absenteeism, had a bad attitude, avoided responding to service calls, and was very slow in performing tasks. Robert Jasso corroborated Allen's testimony regarding Elderkin's avoidance of service calls. Elderkin admitted that Allen had complained about his slowness in performing his assignments. In his March 1996 letter of recommendation, Robert Stewart recommended Elderkin for hire as a mechanic. Finally, Allen was able to hire employees with welding certificates and formal training while Elderkin did not posses such certificates or training. Based on Elderkin's position on the nondiscrimanotory list of employees by importance and the evidence of Allen's dissatisfaction with Elderkin's performance, I find that Allen did not believe that Elderkin was a satisfactory employee and would not have hired Elderkin in any event.

Steve Thomas was not hired as a mechanic. Thomas had 9 years' senority and was listed as number 21 on the list of employees by importance to the operation. Thomas was not among the employees to be hired on the keep 58-percent list. Allen told Thomas that the laid-off employees would be coming back to work but that the plant would be nonunion. Jose Fulginiti told Ross Gephart that Thomas was a shop steward and that Thomas' qualifications did not matter. Allen testified that the other applicants had superior talent, experience and certifications than Thomas. Allen also testified that Thomas was not a good team player, had a poor attitude, and worked against the goals of the safety committee. According to Allen, Thomas was nicknamed "the engineer'' because of Thomas' insistence that his way to perform work was the only way. Thomas testified that he received the nickname because on one occasion he was able to solve a problem that the engineer was unable to solve.

Horacio Villalobos was a mechanic who was listed on Allen's dream team, keep 58 percent and two other lists. Villalobos was listed as number 22 by importance to the operation. Villalobos had worked for Port Costa since September 1994. Prior to that time, he had worked as a mechanic and welder for a contractor performing work at the facility. Allen had recruited Villalobos to work for Port Costa. Respondent contends that Villalobos was not hired because Respondent was able to hire more skilled and experienced mechanics and welders. In June 1996, Allen attempted to offer Villalobos a job but was unable to reach the employee. Villalobos was again offered a job in July. Respondent did not adequately explain why Villalobos was not hired when his name appeared on four of Allen's lists.

III. ANALYSIS AND CONCLUSIONS

A. The Failure to Hire

The General Counsel alleges that Respondent failed to consider for employment or to hire the former Port Costa employees in order to avoid a successorship obligation.

An employer has no obligation to hire all or any of the employees of a predecessor employer. *Howard Johnson Co. v. Detroit Local Joint Exec. Bd.*, 417 U.S. 249, 261–262 (1974); *NLRB v. Burns Security Services*, 406 U.S. 272, 280–281 (1972). However, a new owner cannot refuse to hire the employees of a predecessor because those employees are affiliated with and represented by a union or in order to avoid having to recognize and bargain with a union. An employer's refusal to hire for such reasons constitutes discrimination in violation of Section 8(a)(3) and (1) of the Act. *Kallman v. NLRB*, 640 F.2d 1094 (9th Cir. 1981), enfg. as modified 245 NLRB 78 (1981); *Packing House & Industrial Services v. NLRB*, 590 F.2d 688 (8th Cir. 1978), enfg. as modified 231 NLRB 735 (1977).

In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor'' in the employer's decision. Upon such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The United States Supreme Court approved and adopted the Board's *Wright Line* test in *NLRB v. Transportation Corp*., 462 U.S. 393, 399–403 (1983). In *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996), the Board restated the test as follows: The General Counsel has the burden to persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employees had not engaged in protected activity.

As the Board stated in *U.S. Marine Corp*., 293 NLRB 699, 670 (1989):

> The Board has held that the following factors are among those that establish that a new owner has violated Section 8(a)(3) in refusing to hire employees of the predecessor: substantial evidence of union animus; lack of a convincing rationale for refusal to hire the predecessor's employees; inconsistent hiring

> practices or overt acts or conduct evidencing a discriminatory motive; and evidence supporting a reasonable inference that the new owner conducted its staffing in a manner precluding the predecessor's employees from being hired as a majority of the new owner's overall work force to avoid the Board's successorship doctrine. [Footnote omitted.]

It is unquestioned that the General Counsel must establish unlawful motive or union animus as part of his prima facie case. If the unlawful purpose is not present or implied, the employer's conduct does not violate the Act. *Abbey Island Park Manor*, 267 NLRB 163 (1983); *Howard Johnson Co*., 209 NLRB 1122 (1974). However, direct evidence of union animus is not necessary to support a finding of discrimination. The motive may be inferred from the totality of the circumstances proved. *Fluor Daniel, Inc.,* 311 NLRB 498 (1993); *Asociación Hospital del Maestro*, 291 NLRB 198, 204 (1988).

I find strong evidence of union animus present in this case. First, Mel Brekus, a TXI vice president, told the Port Costa managerial and administrative employees that Respondent's facility would be nonunion and that Respondent would be breaking up the union. Second, Lee Allen made numerous statements revealing an unlawful intention to limit the hiring of the former union-represented employees. Allen initially told employees that they shouldn't worry because they were coming back to work. Consistent with those statements, in December and January, Allen told Ross Gephart that he intended to hire back 90 percent of the employees. However, in February, Allen told employee Gary Silveira that Respondent had strict rules on how he could rehire and that it was a "numbers thing.'' Allen told former vice president Robert Stewart that he had been told he could only hire 49 percent of the former plant employees and that the percentage had been lowered to 46 percent. Allen told Stewart that the purpose was so that the employees would not have voting rights. Further, Allen told Lezlee Wiles and Gina Benevidez that he could only hire a percentage of the employees because Respondent did not want the Union back in. Not only do Allen's statements establish that Respondent's motive was to avoid hiring union members but, more significantly, they constitute an outright confession that Respondent was attempting to avoid any obligation to the Union under the successorship doctrine by hiring less than a majority of the Port Costa employees. *American Petrofina Co. of Texas*, 247 NLRB 183 (1980).

Third, the statements made by Fulginiti to Ross Gephart are strong admissions that Respondent was seeking to avoid hiring a majority of the union employees. Fulginiti told Gephart that Steven Thomas was not hired because Thomas was a union steward. More importantly, Fulginiti said that qualifications did not matter because Allen had been given orders to hire back less than 50 percent of Port Costa's employees.

Fourth and most important, the dream team list and other lists prepared by Allen demonstrate that Allen was constantly checking the percentage of "union'' employees in the production and maintenance departments. His lists clearly draw a distinction between "new hires,'' "nonunion'' former employees, and the former "union'' employees. Allen would have no need to record the union status of employees unless such status was a relevant factor in the hiring process. See *Hubacher Cadillac*, 267 NLRB 960, 968 (1983). Further, Allen did not offer a credible reason for the failure to hire Villalobos and Dominguez whose names appear on four and five of Allen's lists respectively. I have drawn the inference that the reason these employees were not hired was that Allen, as he told Wiles, Benevidez, Silveira, and Stewart, was seeking to avoid hiring a majority of the former Port Costa employees.

Respondent's hiring practices at Port Costa, the union facility, differ from the Olancha and Frazier nonunion facilities. At the nonunion, facilities Respondent hired the former PLA employees. At those facilities Respondent did not seek more applicants by a second round of newspaper advertisements. Further, Respondent's hiring practices at the Port Costa facility differ between union and nonunion employees. Respondent hired, with one exception, the nonunion administrative employees at Port Costa. It appears Respondent did not even interview outside applicants for these nonunion positions. The two nonunion mechanics were hired before union mechanics who were listed higher on Allen's list of employees ranked by importance to the operation. As noted earlier, Allen's various lists of potential hires reveal that Allen was particularly concerned with the percentage of union employees that he hired. Allen drew a distinction between the two nonunion mechanics and the union members. The evidence establishes that the strongest motive in Respondent's hiring decisions was to avoid hiring as a majority of its employees the Port Costa production and maintenance employees represented by the Union.

The burden shifts to the employer to demonstrate that the alleged discriminatees would not have been hired even in the absence of their protected conduct. An employer cannot carry its *Wright Line* burden simply by showing that it had a legitimate reason for the action, but must "persuade'' that the action would have taken place even absent the protected conduct "by a preponderance of the evidence.'' *Centre Property Management*, 277 NLRB 1376 (1985); *Roure Betrand Dupont*, *Inc.,* 271 NLRB 443 (1984). Where, as here, General Counsel makes out a strong prima facie case under *Wright Line*, the burden on Respondent is substantial to overcome a finding of discrimination. *Eddyleon Chocolate Co*., 301 NLRB 887, 890 (1991).

As stated earlier, only 15 (13 union and 2 nonunion) of the 32 bargaining unit employees were hired. While Respondent has established that the plant lost money under its predecessor's operation, it does not follow that Respondent has established a defense for its actions. Respondent hired Lee Allen and, with one exception, Port Costa's managerial and administrative staff. The hiring of Allen and his staff minimizes any argument that Respondent held the employees accountable for its predecessor's poor performance. I find a lack of credible evidence that Respondent's hiring was based on a belief that the employees were the cause of the financial losses suffered by Port Costa.

I find no merit in Respondent's argument that its new hires also had union backgrounds. As Allen's lists or rosters indicate, Respondent was attempting to avoid hiring as a majority of its employees persons who had previously been represented by the Union in the Port Costa facility. Allen counted as nonunion every new hire without regard to whether or not that person had previously been represented by a union.

I am not persuaded by Respondent's argument that at most it would have hired the employees listed on the dream team list. Allen had expressed an intent to hire all or 90 percent of the employees. It is clear that by the time Allen began drafting the dream team lists, he had been told of the hiring limits. The lists appear to be drafted in an attempt to secure the best work force while still hiring an employee complement that would not result in a sucessorship obligation. It does not appear that Allen's

lists, except for the list by order of importance, are free from discrimination.

As to six employees, I find that Respondent has demonstrated that the same action would have taken place even in the absence of the employees' protected conduct. First employee David Schelhorn was offered employment by Allen. It was Schelhorn who raised the question of whether he would be assigned a helper. Allen did not plan to, and did not, operate the quarry with assigned helpers. Allen did have general plant helpers but not full-time helpers assigned to the quarry operators. Allen gave Schelhorn time to think over the offer and attempted to contact Schelhorn. It was Schelhorn who delayed in returning Allen's messages. I find nothing discriminatory in Allen's actions toward Schelhorn.

Allen had previously discharged Jose Escobedo on two occassions. He ranked Escobedo last on the list of employees according to importance to the operation. Further, Stewart did not recomend Escobedo for hire. Given the opportunity to select employees, Allen would not have chosen Escobedo even if he were hiring back 90 percent of the employees.

The evidence indicates that Roberto Esparza arrived at his job interview with a red face and bloodshot eyes. Yonz and Allen believed that Esparza appeared to be intoxicated. Drug testing and a physical were required of all new hires. Further, the company had a policy of drug and alcohol testing for its entire work force. I accept Respondent's defense that Roberto Esparza was not hired because of his appearance at his job interview.

Employee Ronald Zachary had been discharged in the past for misconduct which included threats to supervisors. As Allen testified, "it is difficult to hire someone who has threatened to throw you into a machine.'' Robert Stewart did not recommend Zachary for hire. I find that even absent its discriminatory motive, Respondent would not have hired Zachary. Similarly, employee Chris Preble had on two prior occassions been terminated for what Allen deemed to be misconduct. Further, Preble had gotten into disputes with fellow employees. Finally, I have found that Allen did not believe that Mike Elderkin was a satisfactory employee and would not have hired Elderkin in any event.

Respondent did hire qualified employees, in some cases overqualified employees, in place of the 16 employees at issue here. However, it is not clear that absent its discriminatory intent, Respondent would have even been aware of such applicants. Initially Allen was prepared to hire approximately 90 percent of the former Port Costa employees. The first newspaper advertisements drew responses from applicants that in Allen's view were qualified to "flip burgers.'' The second round of newspaper advertisements appears to be as a result of the plan to avoid a successorship obligation. "When a successor has discriminated in hiring, it can be inferred that substantially all the former employees would have been retained absent the unlawful discrimination.'' *American Press*, 280 NLRB 937, 938 (1986), citing *Love's Barbeque Restaurant*, 245 NLRB 78 (1979). Thus, except for the six employees mentioned above, I have found that Respondent has not established its burden under *Wright Line* that the same action would have taken place absent the unlawful motivation.

In sum, I find that Respondent failed to hire the former employees of Port Costa because it was seeking to avoid a successorship obligation of recognizing and bargaining with the Union. I further find that employee Dave Schelhorn was offered a job and that failure to hire Schelhorn was not discriminatory. Finally, I find that Respondent would not have hired employees Roberto Esparza, Ronald Zachary, Michael Elderkin, Chris Preble, and Jose Escobedo, even in the absence of their protected status. As to the other 10 employees at issue herein, I find that Respondent has not produced sufficient evidence in its defense to overcome the strong evidence of intentional discrimination in order to avoid a successorship obligation to bargain with the Union.

B. The Independent 8(a)(1) Violations

Respondent's handbook provides:

> UNIONS
>
> There is no need for unions at TXI and no employee is required to be a member of a union to work for this company.
>
> No discrimination is made because a person is or is not a member of a union. All employees are treated fairly and *an employee who would want to become a member of a union in the future should expect nothing more than an employee who is not a union member*. [Emphasis added.]
>
> Third party representation (unions) provides none of the wages and benefits paid by this company. Our wages and benefits depend on what we do with our job opportunities both as individuals and as a team. Job security for each of us depends, in great part, on how well we do our jobs.
>
> If a person attempts to pressure you into joining or supporting a union against your best judgment, you should report it to your supervisor. As an employee of TXI, you are not required to sign any cards or statements authorizing a third party to act on your behalf. Intimidation or coercion of any employee concerning the right to refrain from joining a union will not be tolerated.

The General Counsel citing *Forrest City Grocery Co*., 306 NLRB 723, 728 (1992), and *Heartland of Lansing Nursing Home*, 307 NLRB 152, 158 (1992), contends that the underlined portion of the handbook section on UNIONS violates Section 8(a)(1) of the Act because it "effectively tells employees that it would be futile for them to consider joining a union or unionizing.'' I find the cases cited by the General Counsel to be inapposite. In those cases the respondents told employees that it was inevitable that there would be a strike and that the employees would gain nothing or lose their jobs as a result of such a strike. The language at issue here, in context, states that employees will be treated fairly and without discrimination whether or not they are union members. I do not find that the section on unions implies that Respondent will not bargain in good faith with a union duly recognized or certified. Respondent is not required to inform employees of the possible benefits of union representation. In the absence of an implied threat or promise of benefits, Respondent is entitled, under Section 8(c) of the Act, to freely express its opinion that the company does not need a union.

The credible evidence establishes that Mel Brekhus, a vice president of TXI, told the managerial and administrative employees, including office workers Benevidez and Wiles, that after Respondent took over the operation it would not be union and that Respondent would break up the Union. I find such statements to be coercive and violative of Section 8(a)(1) of the Act. *Potter's Chalet Drug*, 233 NLRB 15, 20 (1977), enfd. mem. 584 F.2d 980 (9th Cir. 1978).

During March some of the former Port Costa employees engaged in picketing at Respondent's facility. Lee Allen after seeing a picture of employee Danny Smith in the newspaper told Gary Silveira that Smith had a big mouth and would never work at the plant again. Such a statement implies that employees who engaged in lawful picketing would not be hired by Respondent. Thus, I find that this statement violated Section 8(a)(1) of the Act. At the hearing Allen attempted to justify this statement by claiming that Smith had directed racial slurs towards him during the picketing. However, Allen never explained his remarks to Silveira. Accordingly, I do not find Allen's remarks to be lawful under the Act.

C. Respondent is a Successor Employer

The threshold test for determining sucessorship is: (1) whether a majority of the new employer's work force in an appropriate unit are former employees of the predecessor employer and, (2) whether the business of both employers is essentially the same, whether the employers of the alleged successor are doing the same jobs in the same working conditions under the same supervisors; and whether the new employer has the same production process, produces the same products, and basically has the same body of customers. *Fall River Dyeing v. NLRB*, 482 U.S. 27 (1987). In *Fall River* the Court made it clear that the factors set forth above for determining whether a new employer has continued the same business as the predecessor are to be assessed primarily from the perspective of the employees. The question is whether those employees who have been retained will view their job situation as essentially unaltered.

Respondent meets all the criteria for the finding of successorship. Had Respondent not discriminated in its hiring, it would have hired 23 of the former union employees at Port Costa. That group would have constituted a majority of the employees in an appropriate production and maintenance bargaining unit.[6] Respondent has substantially continued the same operations at the same plant. The former employees that were hired were doing the same jobs under the same supervisors as they did when PLA operated the plant. Respondent was using the same machinery, same equipment and methods of production. While Respondent confined its operation to lightweight aggregate products and did not perform soil remediation like its predecessor,[7] that factor does not appear to be substantial because only 20 percent of Port Costa's revenues were derived from soil remediation. The changes made by Respondent in the operation did not effect the basic jobs and duties of employees. Respondent used essentially the same suppliers as PLA and sold its products to substantially the same customers. Respondent intends to make changes in the future. These changes would not negate a finding of successorship. The totality of the circumstances clearly establishes that there is a substantial continuity between PLA's Port Costa operation and Respondent's Port Costa operation.

As stated earlier, I found that Respondent failed and refused to hire employees to avoid a successorship obligation, I find that Respondent has a statutory obligation to recognize and bargain with the Union. Because Respondent unlawfully refused to hire employees in order to avoid a successorship obligation, it is appropriate to find that Respondent had a statutory obligation to adhere to the employment conditions of the collective-bargaining agreement between its predecessor and the Union from the initiation of its successor operation. *Galloway School Lines*, 321 NLRB 1422 (1996). Respondent had a statutory obligation to bargain with the union prior to making any changes in that status quo. Thus, I find that Respondent violated Section 8(a)(5) and (1) of the Act by making unilateral changes in employment conditions without first bargaining with the Union.

THE REMEDY

Having found that Respondent engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action to effectuate the policies of the Act. Accordingly, Respondent will be ordered to offer Donald Davis, Danny Dominguez, Jesus Esparza, Lucio Guiterrez, Estrellita Lewis, Ricardo Ortiz, Julian Silva, Danny Smith, Steve Thomas, and Horacio Villalobos immediate employment to the positions from which they were unlawfully excluded from employment, dismissing, if necessary, anyone who may have been hired or assigned to perform the work they would have been performing if they had not been unlawfully denied employment or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges. Additionally Respondent shall be required to make the employees whole for any loss of earnings they may have suffered by reason of the discrimination against them, with backpay to be computed on a quarterly basis, making deductions for interim earnings, *F. W. Woolworth Co*., 90 NLRB 289 (1950), and with interest to be provided in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Further, Respondent will be ordered to recognize and bargain with the Union and to retroactively restore the working condiitons that existed under the Union's collective-bargaining contract with the predecessor Port Costa Materials until such time as the Respondent and the Union bargain to agreement or impasse, and to make whole all bargaining unit employees in a manner consistent with the contract's provisions. The remission of wages and benefits shall be computed as in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), plus interest as prescribed in *New Horizons for the Retarded*, supra.

CONCLUSIONS OF LAW

1. The Respondent, Pacific Custom Materials, Inc., a wholly-owned subsidiary of Texas Industries, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union, Warehouse Union Local 6, International Longshoremen's and Warehousemen's Union, AFL–CIO, is a labor organization within the meaning of the Act.

3. The Respondent has violated Section 8(a)(3) and (1) of the Act by refusing to hire the following employees because the

[6] If the 2 nonunion mechanics are excluded from the bargaining unit as they were under the collective-bargaining agreement, the former employees would have represented 23 out of 30 employees. If the 2 nonunion mechanics are counted, former employees would have represented 25 out of 32 unit employees. Either way, absent discrimination, Respondent would have hired as a majority of its work force, employees formerly employed by its predecessor.

[7] Respondent did advertise its soil remediation process at trades shows. Further, Respondent admitted that it intended to perform soil recovery services.

employees were affiliated with the Union and/or in order to avoid having to recognize and bargain with the Union:

Donald Davis	Ricardo Ortiz
Danny Dominguez	Julian Silva
Jesus Esparza	Danny Smith
Lucio Guiterrez	Steven Thomas
Estrellita Lewis	Horacio Villalobos

4. The Respondent has violated Section 8(a)(1) of the Act by threatening that Respondent would not allow its employees to engage in union activities, that employees would be subjected to drug and alcohol testing for testifying before the Board, and that employees would be retaliated against for engaging in picketing.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

ORDER

The Respondent, Pacific Custom Materials, Inc., Port Costa, California, a wholly owned subsidiary of Texas Industries, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to consider for employment and/or refusing to hire employees because of their affiliation with a labor organization or in order to avoid having to recognize and bargain with Warehouse Union Local 6, International Longshoremen's and Warehousemen's Union, AFL–CIO.

(b) Refusing to recognize and bargain in good faith with the Union as the exclusive collective-bargaining representive of its production and maintenance employees at its Port Costa, California facility.

(c) Unilaterally changing wages, hours, and other terms and conditions of employment without first bargaining about these changes with the Union.

(d) Threatening employees with retaliation for engaging in union activities, testifying at a Board hearing, or for engaging in lawful picketing activity.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer employment to the following named employees to the jobs for which they would have been hired or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to the seniority or any other rights or privileges they would have enjoyed had they been hired in February 1996:

Donald Davis	Ricardo Ortiz
Danny Dominguez	Julian Silva
Jesus Esparza	Danny Smith
Lucio Guiterrez	Steven Thomas
Estrellita Lewis	Horacio Villalobos

(b) Make whole the above-mentioned employees for any and all losses incurred as a result of Respondent's unlawful discrimination against them, with interest, as provided in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusals to hire and, within 3 days thereafter, notify each of the employees named above in writing that this has been done and that the discipline found unlawful herein will not be used against them in any way.

(d) Recognize and, on request, bargain collectively with the Union as the exclusive representative of the Respondent's production and maintenance employees at its Port Costa, California facility, with regard to wages, hours, and other terms and conditions of employment and, if agreement is reached, embody it in a signed agreement.

(e) On request of the Union, rescind any departures from terms and conditions of employment that existed prior to Respondent's takeover of PLA's Port Costa Materials operation, retroactively restore preexisting terms and conditions of employment, and make whole the bargaining unit employees by remitting all wages and benefits that would have been paid absent such unilateral changes from on or about February 22, 1996, until it negotiates in good faith with the Union to agreement or to impasse.

(f) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Regional Director, post at its Port Costa, California facilities copies, in English and Spanish, of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure the notices are not altered, defaced, or covered by other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by Respondent at any time since February 22, 1996.

(h) Within 21 days after service by the Regional Director, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

[8] All motions inconsistent with this recommended Order are denied. If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board'' shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''